Supreme Court, U.S.
FILED
NOV 3 2000
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(3)

No. 00-402

IN THE
SUPREME COURT OF THE UNITED STATES

Shirley A. Dvorak,
Petitioner,

v.

The Disciplinary Board of the
North Dakota Supreme Court,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT 1

I. The Federal Constitutional Issue Raised In This Petition Was Raised In A Timely Manner In The State Proceedings Below 1

II. A Significant Federal Question Does Exist Under The Facts Of This Case 5

III. The Petitioner Was Suspended From The Practice Of Law Based On A Violation Of A Rule Of Law First Announced In The Same Decision By Which She Was Suspended 8

IV. There Is A Conflict Between The North Dakota Supreme Court Decision And The Decision Of The Fifth Circuit Court Of Appeals And Other Circuits 9

CONCLUSION 10

APPENDIX

Appendix P
Objections to Order of Dismissal, filed by Paul W. Jacobson, Disciplinary Counsel, in the North Dakota Supreme Court, December 16, 1999 . . . . . 78a

Appendix Q
Letter from North Dakota Supreme Court to
Paul Jacobson, December 21, 1999 . . . . . 80a

TABLE OF AUTHORITIES

Cases

Allenberg Cotton Co. v. Pittman,
419 U.S. 20 (1974) 5

Amalgamated Food Emp. U. Local 590 v. Logan Val. Plaza,
391 U.S. 308 (1968) 1

Asay v. Hallmark Cards, Inc.,
594 F.2d 692 (8th Cir. 1979) 8

Bankers Life and Cas. Co. v. Crenshaw,
486 U.S. 71 (1988) 4

Bar Counsel v. Board of Bar Overseers & Another,
647 N.E.2d 1182 (Mass. 1995) 7

Central Union Tel. Co. v. City of Edwardsville,
269 U.S. 190 (1925) 1

Department of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965) 5

Disciplinary Action Against Anseth,
562 N.W.2d 385 (N.D. 1997) 2

Eddings v. Oklahoma,
455 U.S. 104 (1982) 3

Herb v. Pitcairn,
324 U.S. 117 (1945) 4

Honeyman v. Hanan,
300 U.S. 14 (1937) 4

Illinois v. Gates,
462 U.S. 213 (1983) 4

In re Conduct of Brown,
956 P.2d 188 (Or. 1998) 7-8

In re Independent Counsel Kenneth Starr,
152 F.3d 741 (8th Cir. 1998) 6

In re Ruffalo,
390 U.S. 544 (1968) 4

In re Thalheim,
853 F.2d 383 (5th Cir. 1988) 6, 9, 10

In the Interest of C.W.,
453 N.W.2d 806 (N.D. 1990) 2

In the Matter of Mackay,
416 P.2d 823 (Alaska 1964) 7

In the Matter of the Application for Disciplinary Action Against Howe,
257 N.W.2d 420 (N.D. 1977) 7

Ivan Allen Co. v. United States,
422 U.S. 617 (1975) 10

Lear, Inc. v. Adkins,
395 U.S. 653 (1969) 4

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Leach, 523 U.S. 26, 118 S. Ct. 956 (1998) 6

Lynum v. State of Illinois, 372 U.S. 528 (1963) 4-5

Michel v. Louisiana, 350 U.S. 91 (1955) 1

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 3

Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 733 (1985) 10

Parker v. People of State of Illinois, 333 U.S. 571 (1948) 1

Picard v. Connor, 404 U.S. 270 (1971) 3

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 4

Pulkrabek v. Sletten, 557 N.W.2d 223 (N.D. 1998) 8

State v. Anderson, 427 N.W.2d 316 (N.D. 1988) 2

Street v. New York, 394 U.S. 576 (1969) 3

Sullivan v. Birmingham,
416 N.E.2d 528 (Mass. App. 1981) 9

Ted Lapidus, S.A. v. Vann,
112 F.3d 91 (2d Cir. 1997) 9, 10

United States v. National Bank of Commerce,
472 U.S. 713 (1985) 10

Vachon v. New Hampshire,
414 U.S. 478 (1974) 5

Webb v. Webb,
451 U.S. 493 (1981) 5

Wood v. Georgia,
450 U.S. 261 (1981) 5

Constitutional Provisions, Statutes And Rules

N.D.C.C. § 14-02-05(2) 8

N.D.R.L.D. 3.1(H) . . . . . *passim*

Supreme Court Rule 10(b) 9

Supreme Court Rule 15.6 1

Miscellaneous Authorities

Black's Law Dictionary pp. 139, 401, 407
(5th ed. 1983) 6

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

On or about October 10, 2000, Respondent, The Disciplinary Board of the North Dakota Supreme Court, filed a Brief in Opposition to the Petition for a Writ of Certiorari. Pursuant to Supreme Court Rule 15.6, Petitioner addresses the four new points raised by Respondent.

I. The Federal Constitutional Issue Raised In This Petition Was Raised In A Timely Manner In The State Proceedings Below.

Respondent argues that Petitioner did not raise the federal constitutional claim in her appellate brief to the North Dakota Supreme Court. Even if this were the case, this would not end this Court's analysis. Rather, it would need to determine whether the Petitioner, in fact, had a reasonable opportunity to raise the federal issue in her state court appellate brief. If she did not, this Court would then need to determine at what point Petitioner ***did*** have the first reasonable opportunity to present her federal issue, and if she did so at that point. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. People of State of Illinois*, 333 U.S. 571, 574 (1948); *Amalgamated Food Emp. U. Local 590 v. Logan Val. Plaza*, 391 U.S. 308, 335 n. 3 (1968) (Harlan, J., dissenting) (citing *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925)).

The first reasonable opportunity that Petitioner had to raise her federal constitutional claim was in her petition for rehearing because (1) the North Dakota Supreme Court limited the issues on appeal and (2) Petitioner's constitutional claim was not ripe.

On December 16, 1999, Disciplinary Counsel filed Objections to Order of Dismissal with the North Dakota Supreme Court, objecting to the Disciplinary Board's order that "it was not proven by clear and convincing evidence that" Petitioner violated "Rule 3.4(a), NDRPC" and "Rule 4.4, NDRPC." *See* Petitioner's Reply Appendix P, at 78a-79a. On December 21, 1999, the North Dakota Supreme Court advised the parties that simultaneous briefs would be "***limited to the objections raised***." *Id.* at 80a. (Emphasis added). Consequently, Petitioner not only did not have a reasonable opportunity to raise the federal due process issue in her appellate brief, but was expressly forbidden from doing so by the North Dakota Supreme Court.

In addition, it wasn't until the North Dakota Supreme Court, in its decision of May 18, 2000, invoked its "inherent authority" under N.D.R.L.D. 3.1(H) ***against Petitioner*** that her constitutional issue was ripe for review. Prior to this, Petitioner had no claim of a constitutional violation. The North Dakota Supreme Court has held that generally a litigant may challenge the unconstitutional application of a state law only as it relates to the litigant's conduct or circumstances. *In the Interest of C.W.*, 453 N.W.2d 806, 810 (N.D. 1990); *State v. Anderson*, 427 N.W.2d 316, 319 n. 1 (N.D. 1988). Because Petitioner's constitutional claim was not ripe until after the court's decision, the petition for rehearing was the first opportunity to raise her due process claim.

Respondent argues that Petitioner, by citing to *Disciplinary Action Against Anseth*, 562 N.W.2d 385 (N.D. 1997), "acknowledged and understood" that the North Dakota Supreme Court had the power "to review dismissal of disciplinary proceedings through the exercise of its inherent authority." Respondent's own documents show that Petitioner specifically argued that the appeal was not properly before the

court. *See* Respondent's Appendix A, at 1a. Petitioner's citation to *Anseth* was a mere acknowledgment of what the court did in that case, and in no way constituted a concession that what the court did could properly be done in Petitioner's case. Nor could it constitute a waiver of the federal due process claim raised by this Petition because *Anseth* did not address or determine such a claim.

Respondent further argues that Petitioner's federal due process claim in her petition for rehearing is a "vague allusion" to a constitutional provision. This Court, however, has never required a petitioner to cite "book and verse on the federal constitution." *See Picard v. Connor*, 404 U.S. 270 (1971); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982). This Court has stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 584 (1969).

In this case, Petitioner either "expressly or by clear intendment" raised her federal due process claim in the petition for rehearing. Petitioner argued as one of her four main points: "The 1998 Rules Of Lawyer Discipline Do Not Provide A Mechanism By Which This Court Should Ignore Procedural Irregularities In The Appeal And Invoke Its Inherent Power." *See* Petitioner's Appendix D, at 31a. Under

that heading, Petitioner asserted on several occasions that the North Dakota Supreme Court's actions violated her due process rights and that she was entitled to additional process than was given her. *Id.* at 31a-32a. In making her argument, Petitioner cited no state law or state court case, but, instead, specifically cited to this Court's decision in *In re Ruffalo*, 390 U.S. 544 (1968). *Id.* at 32a. This Court has held federal issues properly raised in state court proceedings where the petitioner cited cases decided by this Court in support of the claimed federal right. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n. 10 (1969). Because of Petitioner's explicit reference to her "due process" rights and her citation to *Ruffalo* in support of her argument, she timely and sufficiently presented the federal due process issue to the North Dakota Supreme Court in her petition for rehearing.

Even if this Court were to conclude that Petitioner did not raise a federal due process issue in the state court proceedings, it could still exercise jurisdiction over this case by granting certiorari because the federal due process issue raised is a "mere enlargement" of and is "so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 n. 2 (1988); *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring in the judgment).

In anticipation that an ambiguity existed whether the federal due process question was raised by Petitioner or considered by the North Dakota Supreme Court, Petitioner sought a certificate from that court clarifying the federal question as permitted by this court's prior decisions. *Honeyman v. Hanan*, 300 U.S. 14, 18-19, 22 (1937); *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945); *Lynum v. State of*

Illinois, 372 U.S. 528, 535-36 (1963); *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 196, 198, 201 (1965); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 21-23 (1974). The court, however, declined the request. *See* Petitioner's Appendix K, at 60a. Under these circumstances, and in the event of a finding of ambiguity by this Court, this Court should vacate the state judgment and remand for clarification of the federal due process question.

Finally, even if Petitioner did not adequately assert a federal claim in state court, this Court "has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness." *Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell and Brennan, JJ., concurring) (citing *Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981)); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974) (per curiam); *Illinois*, 462 U.S. at 247 & n. 1 (White, J., concurring in the judgment). As set forth in the Petition and this Reply Brief, this case presents circumstances ripe for this Court's invocation of its jurisdiction to prevent "fundamental unfairness."

II. A Significant Federal Question Does Exist Under The Facts Of This Case.

Respondent's argument that no significant federal question is involved in this case because the Petitioner was afforded notice of the charges against her and an opportunity to present her defense is misplaced.

In defense of the North Dakota Supreme Court's actions, Respondent repeatedly refers to Rule 3.1(H) as giving the North Dakota Supreme Court the inherent power "to review" orders of dismissal. However, a plain reading of Rule 3.1(H) belies Respondent's argument.

According to the plain language of Rule 3.1(H), "[n]othing in these rules prevents the court ***from instituting*** disability or disciplinary proceedings on its own initiative." (Emphasis added). The term "institute" is a term of art in our judicial system. The "institution" of a proceeding means "[t]he commencement or inauguration of anything, as the commencement of an action. * * *" In legal practice, it means the "[c]ommencement of civil action or criminal prosecution." *See* Black's Law Dictionary p. 407 (5th ed. 1983). The word "institute" is synonymous with the term "commence," which means "[t]o initiate by performing the first act. To institute or start." *Id.* at 139. Similarly, to "[i]nitiate" means "[c]ommence; start; originate; introduce; inchoate. * * * " *Id.* at 401. By Respondent's own argument opposing this Petition, i.e., that the North Dakota Supreme Court "review[ed]" the Disciplinary Board's order of dismissal, Respondent concedes that the court's actions contradicts the plain language of Rule 3.1(H).

Under well-established rules of construction, "[t]he words of a rule are intended to communicate a meaning to those to whom they are addressed, rather than to carry some gloss, hidden rule in the minds of the judges who drafted the rule." *In re: Independent Counsel Kenneth Starr*, 152 F.3d 741, 745, n. 12 (8th Cir. 1998). This Court has held that the plain command of a statute should be given effect "even if doing that will reverse the longstanding practice under the statute and the rule." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Leach*, 523 U.S. 26, 118 S.Ct. 956, 962 (1998). These principles are particularly relevant in lawyer disciplinary proceedings because disciplinary rules "are to be read strictly, resolving any ambiguity in favor of the person charged." *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988).

Rule 3.1(H) gave the North Dakota Supreme Court authority "to institute" disciplinary proceedings, but it did not permit the court to "review" on an appeal the Disciplinary Board's order dismissing the petition for discipline against Petitioner. It is this distinction that is at the heart of Petitioner's federal due process claim. Respondent would have this Court consider this difference of no consequence because "[t]he facts alleged in the Petition for Discipline and the Rules of Professional Conduct alleged to have been violated are the same facts and rules relied upon by the North Dakota Supreme Court," and that there is no significant federal due process issue at stake in this case. Respondent is wrong.

Granted, the charges that the North Dakota Supreme Court relied upon in suspending the Petitioner were the same as was raised by Disciplinary Counsel's appeal, but the Petitioner was denied the opportunity to raise other issues, such as *res judicata*, that may have precluded the "institution" of proceedings by the North Dakota Supreme Court following final adjudication on the merits by the Disciplinary Board. Petitioner's federal due process rights to notice and an opportunity to present a defense mandated that she be given an opportunity to present this *res judicata* defense, or any other appropriate defense. The issue of *res judicata* in lawyer disciplinary proceedings is a defense that has not been decided by the North Dakota Supreme Court, *In the Matter of the Application for Disciplinary Action Against Howe*, 257 N.W.2d 420, 424 (N.D. 1977), thus the issue is not foreclosed. In addition, cases from other state courts suggest that *res judicata* may be a viable defense depending on the facts. *See, e.g.*, *In the Matter of Mackay*, 416 P.2d 823, 838 (Alaska 1964); *Bar Counsel v. Board of Bar Overseers & Another*, 647 N.E.2d 1182 (Mass. 1995); *In re Conduct of*

Brown, 956 P.2d 188 (Or. 1998). Therefore, Petitioner was denied significant federal due process rights.

III. The Petitioner Was Suspended From The Practice Of Law Based On A Violation Of A Rule Of Law First Announced In The Same Decision By Which She Was Suspended.

Respondent, in its brief, misconstrues Petitioner's argument. What Petitioner argues is that it violated her federal due process rights when the North Dakota Supreme Court, in May 2000, gave a new and broader construction to N.D.C.C. § 14-02-05(2), part of the state's defamation statutory scheme, not previously laid down by the court, and then applied this new construction retroactively to Petitioner's 1998 conduct in suspending her based its conclusion that she knew or should have known that the court would construe the statute in the manner in which it did.

While Respondent argues that the law was clear in North Dakota that there can be no liability for defamatory statements that are privileged and that it was equally clear that a communication is privileged when it is given in a judicial proceeding, the law ***was not*** clear, at the time of Petitioner's conduct, that responses to a guardian ad litem's questionnaire, given to other individuals, were entitled to absolute privilege. In North Dakota in 1998, the law accorded absolute privilege only to those communications "within the zone of absolute privilege." *Pulkrabek v. Sletten*, 557 N.W.2d 223, 228 (N.D. 1998). In addition, the decision of the U.S. Court of Appeals for the Eighth Circuit in *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979), and other courts, arguably rendered any application of absolute privilege lost under the facts of this case, in view of the distribution of the responses to other individuals, and not just the guardian ad litem. *See*

Sullivan v. Birmingham, 416 N.E.2d 528, 530, 532 (Mass. App. 1981) (and cases cited).

IV. There Is A Conflict Between The North Dakota Supreme Court Decision And The Decision Of The Fifth Circuit Court Of Appeals And Other Circuits.

Respondent argues that there is no conflict between the North Dakota Supreme Court decision and *Thalheim* because that case dealt with the procedure and authority of a federal district court, whereas the Petitioner was disciplined by the highest court of North Dakota. At issue in both decisions, however, are federal procedural due process rights of attorneys in lawyer disciplinary proceedings. The criteria established by this Court in granting certiorari petitions expressly includes situations where there is a conflict between a state's highest court and a federal court of appeals on a federal issue. *See* Supreme Court Rule 10(b).

Respondent further argues that unlike Rule 3.1(H) in this case, *Thalheim* involved no reservation under the rules for initiating a disciplinary action in the absence of a recommendation by an attorney panel. However, because the North Dakota Supreme Court referred to Rule 3.1(H) as conferring on it "inherent authority," *Thalheim*'s analysis and conclusion as to application of inherent authority to the attorney disciplinary proceedings before it is instructive.

Respondent also challenges Petitioner's reliance on *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2d Cir. 1997). However, by depriving Petitioner of notice that the court would be relying on its authority under Rule 3.1(H) on an appeal, Petitioner was not able to put forth a defense against this exercise of the Rule 3.1(H) authority. The fact that this authority existed and the court had previously exercised

authority under this rule on appeal in *Anseth* does not constitute sufficient notice to satisfy due process. *Ted Lapidus*, *supra*.

Other than challenging *Thalheim* and *Ted Lapidus, S.A.*, Respondent makes no other specific challenge to Petitioner's conflicts except to make a blanket statement, unsupported by fact or legal argument, that these conflicts are "meritless." Contrary to Respondent's argument, the conflicts cited by Petitioner are real because, based on the language in those cases cited by the Petitioner in her initial Petition, the courts in those cases would have certainly decided the state court decision at issue in this case much differently. This Court has recognized that conflicts need not be direct, but may be a conflict in principle. *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 733, 764 (1985).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: November ____, 2000.

Respectfully submitted,

/s/_____

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APPENDIX P

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

[Dated December 16, 1999]

No. 3034-E-9804

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A. DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)

OBJECTIONS TO ORDER OF DISMISSAL

Disciplinary Counsel hereby makes the following objections to the Order of Dismissal entered by the Disciplinary Board in the above action on November 22, 1999:

1. That it was not proven by clear and convincing evidence that Shirley A. Dvorak violated Rule 3.4(a), NDRPC in that she was attempting to use legal means tp [sic] protect her client's rights and her action [sic] were not an unlawful obstruction of access to evidence.

2. That it was not proven by clear and convincing evidence that Shirley A. Dvorak violated Rule 4.4, NDRPC, in that she did not have as a substantial

purpose the embarrassment or the imposition of a burden on the complainant Debra K. Jacobs

Dated this 16th day of December, 1999.

/s/_____
Paul W. Jacobson (ID 03631)
Disciplinary Counsel
Disciplinary Board of the Supreme Court
P.O. Box 2297
Bismarck, ND 58502
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APPENDIX Q

Letter Dated December 21, 1999

Supreme Court of North Dakota

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December 21, 1999

Mr. Paul W. Jacobson
Staff Counsel
Disciplinary Board
P.O. Box 2297
Bismarck, ND 58502-2297

RE: Disciplinary Board v. Shirley A. Dvorak
Supreme Court No. 990384

This will acknowledge receipt of the Objections to Order of Dismissal in the above matter. A copy has been distributed to each member of the Court.

Simultaneous briefs, limited to the objections raised, are due January 22, 2000. While Rule 3.1(G), N.D.R.

Lawyer Discipl., indicates counsel may file briefs limited to objections timely filed, the Court has not reviewed a disciplinary matter and held oral arguments without counsel setting forth their argument and the synopsis of the case in a brief. If you choose not to file a brief for the benefit of the Court, you do so at your own risk. After the deadline has passed, the matter will be set for oral argument on an appropriate term.

Sincerely yours

Penny Miller
Clerk
North Dakota Supreme Court

PM:ss

pc: Mr. Kermit E. Bye
Mr. Richard E.T. Smith, Chair, Disciplinary Board